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In the Supreme Court of the United States

OCTOBER TERM, 1995

GLENN E. HOLMES, D/B/A
HOLMES BI-RITE SUPERMARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Under the Food Stamp Act of 1977, 7 U.S.C. 2021(b)(3)(B), a store that has violated the Act by "trafficking" in food stamp coupons shall be permanently disqualified from participation in the food stamp program, unless the Secretary of Agriculture decides, in his discretion and upon satisfaction of certain criteria, to impose a civil money penalty instead. The question presented by the petition is:

> Whether a store's permanent disqualification from the food stamp program violates the store owner's right to procedural or substantive due process, when the trafficking violations were committed by a store employee without benefit to, or the knowledge, participation, or approval of, the store owner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 67 F.3d 314 (Table). The opinion of the district court (Pet. App. 4a-18a) is reported at 868 F. Supp. 1348.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1995. A petition for rehearing was denied on November 9, 1995. Pet. App. 20a. The petition for a writ of certiorari was filed on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Food Stamp Act of 1977 (the Act), 7 U.S.C. 2011 *et seq.*, a store that wants to accept food stamps must apply to the Secretary of the United States Department of Agriculture (USDA) for approval to participate in the program. 7 U.S.C. 2018(a); 7 C.F.R. 278.1. It is a violation of the Act and regulations for an authorized retail food store to accept food stamp coupons in exchange for cash (except where a small amount of change is returned in connection with an eligible food purchase) or for any other nonfood use. See 7 U.S.C. 2016(b); 7 C.F.R. 278.2(a) and (d). The "buying or selling of coupons * * * for cash or consideration other than eligible food" is known as "trafficking." 7 C.F.R. 271.2.

If the Secretary finds that a food store has trafficked in food stamp coupons, the store "shall be" permanently disqualified from participation in the program. 7 U.S.C. 2021(b)(3)(B). There is only one exception to this statutory penalty: The Secretary has the discretion to impose a civil money penalty in lieu of permanent disqualification if he "determines that there is substantial evidence * * * that such store or food concern had an effective policy and program in effect to prevent violations." *Ibid.*

When a food store is charged with violating the Act or regulations and is thereby subject to disqualification or a civil monetary penalty under Section 2021, it is entitled to notice of such action and an opportunity to submit information in support of its position. 7 U.S.C. 2023(a). USDA regulations provide for several levels of administrative review. See generally 7 C.F.R. Pt. 279. A party aggrieved by a final USDA

decision is entitled to seek *de novo* judicial review in federal district court. 7 U.S.C. 2023(a).

2. Petitioner owns and operates a supermarket that was authorized in March 1990 to participate in the food stamp program. Pet. App. 2a. Between July and September 1992, USDA conducted a compliance investigation at petitioner's store. On four separate occasions during this period, a USDA undercover agent sold a total of $450 worth of food stamps to a cashier employed at petitioner's store for $165 in cash. *Id.* at 2a, 5a.

By letter dated September 30, 1992, USDA notified petitioner that his store was being considered for permanent disqualification from the food stamp program because of those four trafficking violations. Pet. App. 2a, 5a. The letter advised petitioner that, in lieu of permanent disqualification, the store could qualify for a civil monetary penalty if it could show the prior existence of an effective violation-prevention policy and meet the criteria required for that penalty. *Id.* at 5a. The letter also offered petitioner the opportunity to respond to the charges and to present any information, explanation, or evidence to the agency. Gov't C.A. Br. 13.

In response, petitioner denied that the violations occurred. Petitioner did not request a civil monetary penalty. Pet. App. 2a n.3, 5a. USDA concluded that the violations occurred and notified petitioner of its decision permanently to disqualify petitioner's store from the food stamp program. *Id.* at 2a, 5a. On petitioner's request for review, a USDA Administrative Review Officer upheld the permanent disqualification penalty. *Id.* at 2a, 6a.

3. Petitioner sought *de novo* judicial review pursuant to 7 U.S.C. 2023(a). The district court held an

evidentiary hearing in which a USDA investigator and undercover agent testified that one of petitioner's cashiers had purchased food stamps from the undercover agent, and the cashier denied that she had engaged in such transactions. The district court found that the cashier's testimony was "not credible" and that petitioner had failed "to demonstrate any inaccuracies or inconsistencies in the government witnesses' testimony which cast doubt on their credibility." Pet. App. 8a-9a. Citing *Redmond* v. *United States*, 507 F.2d 1007, 1011-1012 (5th Cir. 1975), and *Goodman* v. *United States*, 518 F.2d 505, 507 (5th Cir. 1975), the district court noted that petitioner bore the burden of proving that the trafficking incidents did not occur and found that petitioner had failed to sustain that burden. Pet. App. 8a-9a.

The court rejected petitioner's argument that the Food Stamp Act does not permit permanent disqualification of an "innocent owner" when a store owner's employee has engaged in trafficking without the owner's knowledge or benefit. Pet. App. 9a-11a.

The court also rejected petitioner's constitutional claims. Assuming that petitioner had a property interest in continued participation in the food stamp program, the district court concluded that the administrative and judicial *de novo* review procedures provided petitioner "full procedural due process protection." Pet. App. 14a. The district court further held that the penalty of permanent disqualification for the trafficking offenses committed by a store's employee bears a reasonable relationship to proper legislative purposes—deterrence of food stamp fraud and maintenance of the integrity of the program—and thus does not violate a store owner's right to substantive due process, even if the owner does not

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know of or benefit from the unlawful acts. *Id.* at 14a-17a (citing *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991); *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982)).

Lastly, the court found that because petitioner had agreed, when choosing to participate in the food stamp program, to "accept responsibility * * * for violations committed by the firm's employees," he had waived any challenge to the imposition of that responsibility. Pet. App. 18a.

4. The court of appeals affirmed. Pet. App. 1a-3a. It found petitioner's contention that the trafficking violations did not occur "devoid of merit." *Id.* at 2a n.1. As for petitioner's procedural and substantive due process arguments, the court concluded that its recent decision in *TRM, Inc.* v. *United States*, 52 F.3d 941 (11th Cir. 1995), disposed of those claims. Pet. App. 3a. In *TRM*, the court assumed *arguendo* that a store owner has a constitutionally protected property interest in continued participation in the food stamp program and held that a store owner's procedural due process rights are adequately protected by the *de novo* judicial review provided under 7 U.S.C. 2023(a). 52 F.3d at 943-944 & n.8. *TRM* also held that the permanent disqualification of an "innocent owner's" store from the food stamp program does not violate the owner's right to substantive due process. *Id.* at 944-947. Because it held against petitioner on the merits, the court of appeals determined that it was unnecessary to reach the issue of whether petitioner waived any rights in his agreement with USDA. Pet. App. 3a n.4.

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ARGUMENT

1. Petitioner argues (Pet. 8-11) that the government's evidence that one of petitioner's cashiers violated the Act is not credible. The district court determined that petitioner "was unable to demonstrate any inaccuracies or inconsistencies in the government witnesses' testimony which cast doubt on their credibility," Pet. App. 8a-9a, and the court of appeals affirmed that conclusion, *id.* at 2a n.1. That determination does not warrant further review.

Petitioner further argues (Pet. 8) that he was denied due process when the district court placed the burden on him to prove that the violations did not occur.[1] In support of that argument, petitioner relies on *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958), in which the Court held that the government must bear the burden of proving that speech is unprotected before penalizing an individual on the basis of that speech. *Speiser* and related cases, see, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51, 58-60 (1965), are based on the unique concerns of the First Amendment: The government must bear the burden of proof in order to ensure that the risk of mistake falls on the government and protected speech is not punished. *Speiser*, 357 U.S. at 526; see also *Waters* v. *Churchill*, 114 S. Ct. 1878, 1884 (1994) (opinion of O'Connor, J.) ("[W]e have often held some procedures—a particular

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[1] The district court placed the burden of proof on petitioner in accordance with *Redmond* v. *United States*, 507 F.2d 1007, 1011-1012 (5th Cir. 1975), which held that a plaintiff in a civil suit seeking *de novo* judicial review of his disqualification from participation in the food stamp program has the burden of proving that USDA's action is invalid. Petitioner has raised no statutory challenge to that allocation of the burden of proof.

allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech."). Outside the First Amendment and criminal law areas, "the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993). It is, of course, not unusual for a plaintiff seeking a remedy from the court in a civil case to bear the burden of persuasion.

2. Petitioner maintains (Pet. 11-27) that his permanent disqualification from the food stamp program violates his rights to procedural and substantive due process.[2]

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[2] In support of his due process claims, petitioner asks (Pet. 12) this Court to adopt the reasoning of *R Ranch Market Corp.* v. *United States*, 861 F.2d 236 (9th Cir. 1988). In *R Ranch*, the Ninth Circuit concluded that Congress intended to authorize a store's disqualification from the food stamp program on the basis of an employee's violation of the Act only when the employer knew of and benefitted from the violation. *Id.* at 239.

R Ranch is inapposite, because it was decided on statutory rather than due process grounds, and because the statute has since been amended in a manner indicating that Congress intended to hold stores liable even when the employer does not know of or benefit from the employee's violation. In 1988, Congress authorized the imposition of a civil monetary penalty rather than permanent disqualification when "the Secretary determines that there is substantial evidence that such store * * * had an effective policy and program in effect to prevent violations." Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 344, 102 Stat. 1664 (codified at 7 U.S.C. 2021(b)(3)(B) (1988)). That amendment makes clear that Congress intended to penalize stores for violations by employees even when the store owner does not know of or benefit from the violations. See

a. Petitioner first argues (Pet. 12-17) that he has a property interest in continued participation in the food stamp program, and that he was unconstitutionally deprived of that interest without procedural due process. Every circuit court that has considered the issue has held, as did the court of appeals here (Pet. App. 3a) and in *TRM, Inc.* v. *United States*, 52 F.3d 941, 943-944 (11th Cir. 1995), that the *de novo* judicial review made available by the Food Stamp Act, 7 U.S.C. 2023(a), adequately protects any due process right of a store owner who has been disqualified from the food stamp program. See *Haskell* v. *United States Dep't of Agric.*, 930 F.2d 816, 819-820 (10th Cir. 1991); *Ibrahim* v. *United States*, 834 F.2d 52, 54 (2d Cir. 1987); *McGlory* v. *United States*, 763 F.2d 309, 312 (7th Cir. 1985); *Cross* v. *United States*, 512 F.2d 1212, 1217-1218 (4th Cir. 1975); *Redmond* v. *United States*, 507 F.2d 1007, 1012 (5th Cir. 1975).

b. Petitioner also asserts (Pet. 17-27) that permanent disqualification from the food stamp program of an "innocent" store owner, due to the unlawful actions of his employee, violates the owner's right to substantive due process. In *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 13-15 (1991), this Court held that the imposition of liability on an insurance company for the fraud committed by one of its agents without the company's knowledge or con-

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Ghattas v. *United States*, 40 F.3d 281, 283-284 & n.3 (8th Cir. 1994) ("[U]nder the 1988 amendments * * * a store may be sanctioned despite its owner's innocence."); *Freedman* v. *United States Dep't of Agric.*, 926 F.2d 252, 258-260 (3d Cir. 1991) (same). In this case, petitioner did not request a penalty instead of disqualification. Thus, whether a civil money penalty should have been imposed on petitioner instead of permanent disqualification is not at issue.

sent does not violate the company's right to substantive due process. As the Court explained, holding an employer liable for the intentional fraud of its employees—even where the employer is itself innocent—legitimately "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" *Id.* at 14 (quoting *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112, 116 (1927)); see also *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) ("Only [an employer] can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the employer] to take those steps.").

In accordance with *Pacific Mutual Life Insurance*, the court of appeals in this case (Pet. App. 3a) correctly relied on its earlier decision in *TRM*, 52 F.3d at 946-947, which upheld the disqualification of store owners in such circumstances as rationally related to the purpose of deterring illegal trade in food stamps. As the *TRM* court noted, "limiting liability * * * would have the perverse effect of encouraging store owners' willful blindness of their employees' transgressions, and would deprive owners of the incentive to invest in precautionary anti-trafficking measures." *Id.* at 947.[3]

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[3] Petitioner's reliance on *Liparota* v. *United States*, 471 U.S. 419 (1985), and other cases concerning criminal sanctions is misplaced, because those cases are premised on concerns unique to criminal liability. See *Morissette* v. *United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will

Relying on cases such as *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973), *Vlandis* v. *Kline*, 412 U.S. 441 (1973), and *Stanley* v. *Illinois*, 405 U.S. 645 (1972), petitioner argues (Pet. 15-16, 23-27) that the Food Stamp Act offends due process because it creates an irrebuttable presumption of a store owner's unfitness to continue participation in the food stamp program. Those cases are inapposite. The Food Stamp Act makes no irrebuttable presumption concerning whether trafficking has occurred at a particular business. A store owner such as petitioner has the opportunity to prove either that no trafficking took place, or that the implicated employee was not acting with apparent authority within the scope of his or her employment (*e.g.*, the incidents occurred at the employee's home or another food store, while the person was off-duty). But once the fact of the employee's violation at the cited business is established, it is the statute's application of the well-established legal principle of vicarious liability—rather than of an irrebuttable presumption of fact or guilt—that results in the imposition of a penalty on the store.[4]

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and a consequent ability and duty of the normal individual to choose between good and evil.").

[4] Because petitioner's disqualification from the food stamp program on the basis of his employee's violations of the Act does not violate his rights to procedural and substantive due process, there is no need to consider petitioner's argument (Pet. 28-30) that he could not constitutionally be required to waive such due process rights as a condition of participating in the food stamp program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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